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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Number 483

DR. HENRY M. LADREY, *Petitioner*,

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To: The Honorable The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

Henry M. Ladrey, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 31, 1958.

OPINIONS BELOW

There was no opinion rendered in the United States District Court for the District of Columbia.

The opinion of the United States Court of Appeals rendered July 31, 1958, is not yet reported but is contained in the certified transcript of record submitted herewith and appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbit was dated and entered July 31, 1958.

The jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code.

QUESTIONS PRESENTED

1. Where a telephone call is made to a party's office by a witness under police supervision, from a telephone located in an office in police headquarters where the witness is held in custody and questioned as an accomplice, and the communication made by the party to the witness is overheard by a police officer who, unknown to the party, is listening to the conversation on a telephone extension in police headquarters, is not the police officer's testimony as to the contents of that communication, offered in a proceeding against the party in a federal court, inadmissible under Section 605 of the Federal Communications Act?

2. Whether a statute authorizing the Distirct Court for the District of Columbia to revoke a physician's license "upon evidence showing to the satisfaction of the court that (he) has been guilty of misconduct" confers a power in terms so broad and meaning so vague as to render the statute void?

STATUTES INVOLVED

47 U. S. C. A., Sec. 605

"... and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person ..."

Title 2, Section 123, D. C. Code (1951 Ed.)

The District Court of the United States for the District of Columbia, sitting as a court of equity, may suspend or revoke any license issued and any registration effected under this chapter, upon evidence showing to the satisfaction of the court that the licentiate or registrant, as the case may be, has been guilty of misconduct or is professionally incapacitated.

Title 2, Section 13, D. C. Code (1951 Ed.)

If a person licensed or registered under the provisions of this chapter be convicted in the District Court of the United States for the District of Columbia of any felony, the court, without further hearing or procedure, may suspend for such time and under such conditions as it deems proper, or may revoke, the license or registration of the defendant, in addition to imposing any other penalty provided by law . . .

Amendment V to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On November 26, 1954, one Helen Leftwich died in an apartment on 13th Street, Northeast. According to the Deputy Coroner, death resulted from peritonitis due to septic abortion. Dr. Ladrey, petitioner herein, was arrested on November 27, 1954, on an abortion charge by officers of the Metropolitan Police Department. On January 11, 1956,

in Case Number 1265-54, entitled United States v. Henry M. Ladrey, a grand jury returned an Ignoramus in the case.

Notwithstanding, on July 19, 1955, in Civil Action No. 3156-55, the United States Attorney for the District of Columbia filed a complaint on behalf of the Commission on Licensure to Practice The Healing Art in the District of Columbia—seeking revocation of petitioner's license on the grounds that he had committed the abortion upon Helen Leftwich.

Trial was had on February 19, 1957.

Plaintiff's evidence of petitioner's connection with the abortion consisted solely of the testimony of the dead girl's paramour, George Matthews, and a police officer of the Homicide Squad, Keith Gosman. According to Matthews, he was in the doctor's office for treatment to his foot on Thursday, November 18, 1954, and while there mentioned to the doctor that his girl friend was pregnant, and "asked him if there was anything possible that he could do towards us in this particular case"; and he was told to bring her in on the next Saturday. On the appointed day Matthews drove Miss Leftwich in his automobile all the way to New York City, where she visited her sister who is a nurse, for about a half hour, and then drove straight back to the District of Columbia and directly to Dr. Ladrey's office, arriving there at about 5:45 P.M. There were patients in the waiting room, and after some considerable time it was their turn. Miss Leftwich went in to the private office while Matthews waited in the outer room. After one-half hour, the doctor and the girl came out, and Matthews took the girl home to her apartment. Matthews visited Miss Leftwich again on the next day (Sunday); and on Wednesday, November 24, 1954, he went to the girl's apartment after receiving a telephone call at about 1:30 P.M. Matthews stayed at the apartment until about 10:30 P.M., then went home; but returned the next morning. According to Mat-

thews he made several phone calls to petitioner during the day, and finally, after a 11:45 call, Dr. Ladrey came to the girl's apartment, rushed to the bed, gave Miss Leftwich a needle, and stated that she was dead. Then petitioner is alleged to have told Matthews not to mention to anyone that he had been there, grabbed a phone number off a pad on the telephone stand, and left the apartment.

Officer Gosman of the police department testified that he and Sgt. Waters of the homicide squad questioned Dr. Ladrey on the afternoon of November 27, 1954, and that Waters took a typed statement (R. 37). Gosman stated that Ladrey first gave answers to his several questions denying that the girl came to his office and that he (Ladrey) had ever been to her apartment. Then, according to Gosman, Matthews was brought into Ladrey's presence, "told his story"; and then taken away. At this time, states Gosman, Ladrey admitted that the girl and Matthews had come to his office, and that he had gone to the girl's apartment. Then Gosman related alleged telephone conversations between Matthews and Ladrey which took place when Matthews called Ladrey from a police department telephone under Gosman's supervision. Gosman stated that he "monitored the conversation through an extension telephone," and that after Dr. Ladrey told Matthews to come to his office, he asked Matthews if he was sure he was not being followed by the police. This testimony was admitted over petitioner's objection to it as wire-tap evidence (R. 39-40).

On cross examination Gosman admitted that Ladrey refused to make a statement, and refused to answer questions (R. 42).

Ladrey was called by respondent. and denied any complicity. He also vehemently denied that he made any statement to Gosman or answered any questions. Ladrey also stated that Lt. Hartnett, and not Sgt. Waters, was with Gosman when Gosman attempted to question him.

In a short opinion the court found "the defendant guilty on the charge of having performed an abortion," and stated that it arrived at that conclusion because it believed the accomplice Matthews, and did not believe the defendant.

A judgment revoking petitioner's license was entered on February 27, 1957. It was from this finding and judgment that appeal was taken.

In the Circuit Court of Appeals oral hearing of this case was had originally before the usual three-member panel. Later the Circuit Court, on its own motion, ordered rehearing en banc because of the importance of the various aspects of the case. The Court affirmed the trial court's decision (Edgerton, Chief Judge, and Bazelon and Fahy, Circuit Judges, dissenting).

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted in this cause under subdivision 1 (b) of Rule 19 of this Honorable Court because the United States Court of Appeals for the District of Columbia Circuit has rendered a decision in conflict with decisions of the United States Court of Appeals for the second, sixth and seventh circuits on the matter in the following particulars:

The Second Circuit has held that a third person's overhearing of a communication from one party over a telephone to another, made while the third person is listening in on an extension telephone with the "consent" of the receiving party, is an interception within the meaning of Section 605 of the Federal Communications Act (47 USC Sec. 605) where the sending party has not also consented to such listening-in. *United States* v. *Polakoff*, 112 F. 2d 888, 134 ALR 607 (2d Cir.); *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (2d Cir.). The Seventh Circuit and the Sixth Circuit have held that the "consent" of the receiving party only

is sufficient to render the statute inapplicable. *United States* v. *White*, 228 F. 2d 832 (7th Cir.); *Flanders* v. *United States*, 222 F. 2d 163 (6th Cir.). The District of Columbia Circuit in its opinion below has held such listening-in to be without the purview of the statute without reference to the "consent" of either party. In this respect the decision is also in conflict with an applicable decision of this Honorable Court, namely, the case of *Rathbun* v. *United States*, 355 U. S. ——, 2 L. Ed. 2d 134 (1957).

Moreover, the court below has decided an important question involving the validity of an Act of Congress, The Healing Arts Practice Act, District of Columbia, in a way in conflict with a prior decision of that court. The question is one of importance to many professional men and women of the District of Columbia and should be settled by this Honorable Court.

ARGUMENT I

The holding of the Circuit Court of Appeals for the District of Columbia Circuit in this case is in conflict with the holdings of other Courts of Appeals interpreting Section 605 of the Federal Communications Act; and is at odds with the decision of this Court in *Rathbun* v. *United States*, 355 U. S. ——, 2 L. Ed. 2d 134 (1957).

In *Nardone* v. *United States*, 302 U. S. 379, 82 L. Ed. 314 this Court held that under the provisions of the Federal Communications Act, testimony of the contents of certain intercepted telephone communications was inadmissible. There the interception was by means of tapping telephone wires apparently without the knowledge of either the sender or the receiver of the communication. This Court was not called upon to decide the question of the admissibility of testimony of the contents of telephone communications overheard by third persons listening in on telephone extensions until twenty years later, in the case of *Rathbun* v. *United*

States, 355 U. S. ——. 2 L. Ed. 2d 134. However, the latter question had in the meantime been dealt with by several Circuit Courts of Appeals. In *United States* v. *Polakoff*, 112 F. 2d 888, 134 ALR 607, the Second Circuit held that a recording of an accused's declarations made by telephone to the prosecution's chief witness who had called the accused from the office of an agent of the Federal Bureau of Investigation, which had been made by a machine attached to a telephone extension to the phone upon which the witness was calling, was an unauthorized interception under Section 605, and hence inadmissible, because done without consent of the accused who was the sender. This decision was followed by the Second Circuit in *Reitmeister* v. *Reitmeister*, 162 F. 2d 691.

However, under similar circumstances, the Sixth Circuit and the Seventh Circuit have held that the testimony of third persons as to the contents of telephone communications of the sending party, overheard by those third persons while listening in on extension telephones with the knowledge and consent of the receiving party, is not inadmissible under Section 605. Since the receiver had consented, there was no unauthorized interception within the meaning of Section 605, notwithstanding the fact that the sender had not also consented to the interception. *United States* v. *White*, 228 F. 2d 832 (7th Cir.); *Flanders* v. *United States*, 222 F. 2d 163 (6th Cir.). In the *Rathbun* case this Court took notice of this split of authority among the Circuit Courts, 355 U. S. —— at ——, 2 L. Ed. 2d 134 at 136, and then went on to determine the applicability of Section 605 to circumstances dissimilar to those involved in the forementioned cases.

In *Rathbun*, a telephone "subscriber" had gone to the police and "requested" that they come to his home and listen-in on a telephone call which he anticipated from the accused. The police, in compliance with this request, went

to the subscriber's home. When accused phoned the subscriber, the police at the subscriber's "direction" listened-in on a telephone extension in another room of the subscriber's home. Upon these facts, this Court held that there had been no "interception" within the meaning of Section 605. The Court below has relied upon this holding to support its holding in the instant case that no interception within the meaning of Section 605 has here occurred. Petitioner submits that this unwarranted misapplication of the *Rathbun* decision is fraught with such dangerous implications that this Court ought not permit it to stand uncorrected.

As petitioner views *Rathbun* it seems clear that this Court based its decision upon a purposive construction of the statute. It refused to attribute to Congress a legislative intent to bring about through Section 605 the results inherent in the position argued by petitioner there. It was concerned with the situation where a telephone call is made to a subscriber who has more than one telephone and another—e.g., "a family member, an employee, a trusted friend, or even the police"—at the subscriber's direction, "listens to a conversation to which [the] subscriber is a party," 355 U. S.—— at ——, 2 L. Ed. 134 at 137. Too, this Court pointed out that Section 605 is penal in nature. The extension of criminal liability even to the "secretary who listens to a business conversation at her employer's direction in order to record it," *ibid*, was implicit in the position argued by petitioner there.

These considerations which weighed so heavily with this Court in *Rathbun* are not involved in the instant case. Here we have no subscriber directing another to listen in on his extension to a conversation to which he is a party. Indeed, the one party to the conversation who knew of the interception was not a subscriber to the telephone over which he conversed. Judge Bazelon, in his dissenting

opinion, brings to light the aspect of this case which is so pregnant with future mischief:

> There is nothing to suggest that Matthews, who telephoned to the present appellant, invited or requested the police to listen to the conversations. On the contrary, it is quite as likely that the plan to have the police listen and even the plan to have Matthews telephone to the appellant, originated with the police. It is not even clear that Matthews freely consented, though he did at least submit. He was not using his telephone but a police telephone. There is nothing to suggest that he could have prevented them from using their own telephone in their own way. In other words, there is no evidence that he could have made the calls without their listening to it. It does not appear that they consulted him instead of merely telling him they were going to listen. In my opinion the *Rathbun* rule, that there is no interception of a telephone conversation when one party to it invites a third person to listen, has no application to these facts."

Just as this Court in *Rathbun* has decided that in enacting Section 605 Congress did not intend to severely restrict the ordinary use of telephone extensions by subscribers, or to make criminal innocent and ordinary usage of extensions; so here a like regard for the preservation of personal liberty requires this Court to hold that Congress did not, on the other hand, intend to leave police agents free to intrude by deceit and stealth into subscribers' homes by means of ostensibly friendly telephone calls made to them over police extension phones by those who are in their toils. The decision below lends judicial approval to police methods which can fairly be deemed destructive of our system. We do not think that Congress intended that for purposes of crime detection police officers "should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." This Court should grant this petition and make it clear to the lower Federal Courts that Congress fully intended to ban such "dirty business."

ARGUMENT II

The Court of Appeals' decision in this case upholds a statute governing the licensing of members of the medical profession which is so vague and indefinite that it fails to meet the requirements of due process under our Constitution; and at the same time it decides an important question of local law in a way which is in conflict with the only other applicable local decision.

Petitioner contends that Title 2, Section 123, of the D. C. Code is void and unconstitutional in that it is so vague and indefinite as to violate the requirements of due process. And, inasmuch as it confers a power upon the District Court in terms so broad and meaning so vague that the application or nonapplication of the statute is left within the uncontrolled discretion of the court, it represents an unconstitutional delegation of legislative power.

A predecessor statute made a license subject to revocation for several enumerated reasons, and for "unprofessional or dishonorable conduct." The United States Court of Appeals for the Distiret of Columbia, in the case of *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443, held that so much of that Act of Congress as authorized the Board to revoke the license of a medical practitioner upon conviction of "unprofessional or dishonorable conduct" independently of other offenses was void for uncertainty.

The present Act went into effect in 1929, and the instant case is the first time that the lower court has been called upon to interpret the measure. The broad term "misconduct" as used in the statute cannot be restricted in meaning to, or equated with "unprofessional conduct" because the present statute repealed the old statute which specified "unprofessional conduct", and also the present statute sets forth "professionally incapacitated" as a ground for revo-

cation. Hence, it is obvious that Congress was aware of the language necessary to limit "misconduct" to "professional misconduct" if it wished so to do. It is suggested that the meaning of such an unbridled term cannot be determined.

Judge Bazelon, speaking for himself, and Chief Judge Edgerton and Judge Fahy, in their dissent, squarely presents petitioner's position when he states:

> The Statute, D. C. Code Section 2-123, authorizes the District Court to revoke a doctor's license "upon evidence showing to the satisfaction of the Court that [he] has been guilty of *misconduct*. . . ." Emphasis supplied. No one, I suppose, would suggest that Congress may validly authorize the District Court to convict an individual of a crime and sentence him to fine or imprisonment for being guilty of "misconduct." Such a standardless criminal statute would obviously be void for vagueness. And, as this court has said, "the principles that apply in the protection of" a doctor's right to practice his profession "are of the same general nature, though not in all particulars, as those which safeguard him when prosecuted for the commission of a minor offense." *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443, 454 (1905).
>
> In *Czarra*, we held invalid the predecessor statute of D. C. Code Section 2-123 which authorized license revocation on a finding of "unprofessional or dishonorable conduct."
>
> We said:
>
> Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about

which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbirtrary power of discriminating between the several classes of acts. 25 App. D. C. at 453.

We concluded that the standard provided—"unprofessional or dishonorable conduct"—was essentially no standard at all. Yet that standard, in a statute dealing with the medical profession, is probably clearer and more definitive than the "misconduct" standard provided by the instant statute. The earlier statute would at least exclude as a ground of revocation such misconduct as does not reflect on professional standing or personal honor. Under the present statute any misconduct—even traffic offenses—could, in the uncontrolled discretion of the District Court, serve as a basis for revoking a license."

The validity of the dissenters' position is demonstrated by the fact that on September 6, 1958, the United States Attorney for the District of Columbia, who is legal counsel for the Commission on Licensure to Practice the Healing Art in the District of Columbia, proposed new legislation governing the system of licensing doctors. One of the stated objectives of the proposed act is to spell out in detail the reasons for denying or revoking a license so as to avoid the criticism of vagueness leveled at the present statute by the courts. (Washington Sunday Star, September 7, 1958, pp. 1A, 6A.)

Petitioner respectfully submits that when a statute is so vague as to perplex learned judges, and to move those charged with the duty of its enforcement to virtually concede its infirmity by seeking passage of a clearer and more definite act, an inquiry as to its validity by no less an authority than this Honorable Court becomes a matter of major importance not only to the hundreds of professional persons governed by the measure, but also to the entire citizenry of the District of Columbia, and the general administration of justice in that jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari, to bring before this Court the decision and judgment of the Court of Appeals of the District of Columbia Circuit, should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13906

DR. HENRY M. LADREY, APPELLANT,

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA, APPELLEE.

Appeal from the United States District Court for the District of Columbia.

Decided July 31, 1958

Mr. William B. Bryant, with whom *Messrs. William C. Gardner* and *Joseph C. Waddy* were on the brief, for appellant.

Mr. Harry T. Alexander, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, *E. Riley Casey* and *Robert J. Asman*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, *Chief Judge*, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting *en banc*.

DANAHER *Circuit Judge*: The Commission on Licens-

ure to Practice the Healing Art in the District of Columbia brought an equity action[1] seeking the revocation of the license of the appellant to practice medicine and surgery in the District of Columbia. Judgment having been entered in favor of the Commission, this appeal followed.

The complaint charged that appellant had been guilty of "misconduct" in that while a duly licensed and registered doctor and surgeon he had on or about November 23, 1954, prescribed or administered a drug or had used an instrument on the person of a pregnant woman with the intent of procuring a miscarriage, as a result of which the woman had a miscarriage and died three days later. The trial judge found the appellant guilty accordingly, but not guilty in two other charged particulars: (1) of having visited the deceased, but denying he had done so; and (2) of failing to notify the police or the coroner of her death.

Appellant here complains of error in four respects. First, he charges the finding that he committed the abortion is clearly erroneous and rests upon insufficient grounds. Next he argues that the statutory term "misconduct" is too vague and indefinite to meet the requirements of due process, and that revocation of a doctor's license may be had only under D. C. CODE § 2-131 (1951)[2]

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[1] D. C. CODE § 2-123 (1951), in the portion here pertinent reads as follows:

"The District Court of the United States for the District of Columbia, sitting as a court of equity, may suspend or revoke any license issued and any registration effected under this chapter, upon evidence showing to the satisfaction of the court that the licentiate or registrant, as the case may be, has been guilty of misconduct or is professionally incapacitated."

[2] This section in pertinent part reads:

"If a person licensed . . . be convicted in the District Court of the United States for the District of Columbia of

following conviction of a felony. Finally, he challenges, because of the prohibition against wire tapping,[3] the admission of details of two telephonic conversations as part of testimony by a police officer who listened on a telephone extension while a material witness talked by telephone to the appellant.

I

The trial court's findings of fact emerged from a conflict which it was singularly the duty of the trial judge to resolve. Our review discloses substantial evidence of record from which the trier might fairly conclude that the decedent had been aborted and that the appellant had undertaken to, and did, perform whatever acts were involved. That the decedent died as a result is beyond peradventure. We cannot say that the court's findings have been shown to be clearly erroneous, indeed a careful examination of the transcript leads us to agreement with the findings of the trier and the conclusions based thereon.

II

The Code's use of the word "misconduct"[4] seems at first reading to present a problem in that no statutory standards to govern its present application have been set forth. When we perceive, however, that the statute permits revocation upon this ground only after the institution of action in the United States District Court for the District of Columbia sitting as a court of equity, we first

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any felony, the court, without further hearing or procedure, may . . . revoke, the license . . . of the defendant . . . ."

[3] 47 U.S.C.A. § 605 (1952) reads in pertinent part:

". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication . . . ."

[4] *Supra* note 1.

may fairly look to the act as a whole, its purpose and objectives, and then to the complaint itself and to the pleadings of record. In this perspective, we observe, Paragraph 3 of the complaint was quite specific in that the "misconduct" charged had been spelled out in the words of the criminal statute which defines the offense.[5] Surely appellant may not be heard to say that the allegations as to the particular offense are not sufficiently stated.[6] There was no claim at the trial that appellant had not been fully apprised of the nature of the offense. Had he been in doubt as to particulars either to enable him to plead or to prepare for trial, he might have moved for a more definite statement under the Rule.[7]

There has been no claim of variance between the allegations and the proof. There is no suggestion that the complaint and the evidence offered to support it had involved elements of surprise prejudicial to the appellant's case.[8] It is not argued that the statute transcends the power of Congress or that practitioners of medicine may not be regulated.[9] It is argued, and the point is raised here for the first time, that the statute is "so vague and

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[5] D. C. CODE § 22-201 (1951) reads in part:

"Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means . . . ." There was no claim by appellant that he had acted to preserve the victim's life; he denied the charge. Cf. D. C. CODE § 22-201 (Supp. VI 1957).

[6] Powers v. United States, 75 U.S.App.D.C. 371, 128 F.2d 300 (D.C. Cir. 1942), *cert. denied*, 316 U.S. 693 (1942).

[7] FED. R. CIV. P. 12(e), and see generally, MOORE, FEDERAL PRACTICE ¶ 12.18 (2d ed. 1948).

[8] Cf. Berger v. United States, 295 U.S. 78, 82 (1935).

[9] Cf. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Watson v. Maryland, 218 U.S. 173 (1910); Kemp v. Board of Medical Supervisors, *infra* note 18.

indefinite as to violate the requirements of due process."

After providing that the District Court sitting as a court of equity may revoke a license where the licentiate "has been guilty of misconduct or is professionally incapacitated," [10] the Code continues that proceedings shall be commenced by verified petition. "Proceedings shall be conducted according to the ordinary rules of equity practice and such supplementary rules as said [District Court] may deem expedient to carry into effect the purpose and intent of this chapter." The Court is authorized to determine whether a license shall be suspended or revoked. Its decision is subject to appeal to this court.

The "Healing Arts Practice Act, District of Columbia, 1928" [11] repealed the earlier act governing the practice of medicine and surgery in the District [12] which by its section 10 had committed revocation to a board of medical supervisors. The board had been authorized to act for various causes, such as the "employment of fraud or deception in passing the examinations . . . chronic inebriety, the practice of criminal abortion, conviction of crime involving moral turpitude, or unprofessional or dishonorable conduct." [13] The present act eliminated the board of medical

---

[10] *Supra* note 1.

[11] Act of February 27, 1929, 45 STAT. 1326. For additional background, see H.R. REP. No. 2009, 70th Cong. 2d Sess. (1929) re S. 3936 and House debate 70 CONG. REC. Part 3, 3272 *et seq.*, 70th Cong. 2d Sess. (1929).

[12] Act of June 3, 1896, 29 STAT. 198.

[13] Cf. Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905). There this court had said that the practice of criminal abortion, though made a separate criminal offense, was "sufficient cause" for revocation. On the other hand, distribution of a lewd publication was held not to ground the Board's finding of unprofessional or dishonorable conduct, since such terms had not been defined. Thus insufficient safeguards had been provided for the practitioner "when prosecuted for the commission of a minor offense." *Id.* at 454.

supervisors as judges in revocation proceedings and substituted the United States District Court, sitting as a court of equity. The licentiate in every case has available to him the full protection of the Federal Rules. "Misconduct" as a ground for suspension or revocation is not left as a matter of opinion [14] but is susceptible to complete exposition under the Rules and requires proof as a matter of fact accordingly.

Nor can we doubt that every medical practitioner knows fully that the performanee of a criminal abortion is misconduct.[15] He need not guess at the meaning of the term in view of his status and the Code which governs. "The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage." [16] The purpose of the statute here is clear and calls for no further exploration into semantics.[17] Congress in-

---

[14] Cf. School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 104-06 (1902).

[15] Cf. United States v. Wurzbach, 280 U.S. 396 (1930), where at 399, Holmes, J. writes:

"[The objection] would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States*, 229 U.S. 373." And see Rathbun v. United States, 355 U.S. 107, 109 (1957); United States v. Ragen, 314 U.S. 513, 523 (1942).

[16] Pickett v. United States, 216 U.S. 456, 461 (1910); United States v. Petrillo, 332 U.S. 1, 7 (1947).

[17] See, however, as to "misconduct," Hatfield v. New Mexico State Board of Reg., 60 N.M. 242, 290 P.2d 1077, 1080 (1955).

tended to provide a remedial measure for the protection of the public,[18] and "misconduct" certainly included, and must have been known by a medical practitioner to have included, the performance of an illegal abortion.[19]

We need not rest upon the foregoing for quite apart from what has been said, the appellant failed in the District Court to raise any question as to the constitutionality of the statute. Accordingly, we go no further into this aspect of the case.[20]

III

It is insisted that, in any event, resort may not be had to proceedings under D. C. Code § 2-123 (1951), for revocation may be ordered only after *conviction* of a felony. We are pointed to D. C. Code § 2-131 which provides that if one licensed "be convicted in the District Court of the United States for the District of Columbia of any felony, the court, without further hearing or procedure, may suspend . . . or may revoke, the license . . . of the defendant, in addition to imposing any other penalty provided by law." This section simply provides an *additional* remedy and for summary action when a licentiate shall *here* have been convicted of "any" felony. It is clear that any such conviction is to be deemed to establish without more, the unfitness of the licentiate to [illegible] to hold a license. The section avoids circuity and [illegible] in proceed-

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[18] Kemp v. Board of Medical Supervisors, 46 App.D.C. 173, 180 (D.C. Cir. 1917).

[19] Cf. Cherry v. Board of Regents, 289 N.Y. 148, 44 N.E. 2d 405, 411 (1942).

[20] Duignan v. United States, 274 U.S. 195, 200 (1927); Wong Tai v. United States, 273 U.S. 77, 78 (1927); cf. Ullman v. United States, 350 U.S. 422, 439 n. 15 (1956); and see generally, United States v. Petrillo, *supra* note 16, 332 U.S. at 10.

ings.[21] Dispelled is all necessity for weighing offenses involving moral turpitude and like considerations.[22] Moreover, the felony to predicate any such summary forfeiture must have been committed *in the District of Columbia,* whereas proceedings under D. C. CODE § 2-123, may rest upon a comparable offense committed in nearby Virginia, where appellant also had an office, or elsewhere, with or without conviction.[23] The appellant has mistakenly argued that a conviction of "any felony" is a prerequisite to an equity proceeding for revocation under § 2-123.

IV

Detective-sergeant Gosman was permitted, over appellant's objection, to relate the details of a telephone conversation between appellant and one Matthews who had told appellant of the pregnancy of the deceased woman and who then arranged to bring the woman to appellant's office. Matthews at the police headquarters had given a statement to officers of the homicide squad. Thereafter, while still at headquarters, with the officer on an extension telephone as Matthews knew, he phoned the appellant who was in his own office. Matthews told the appellant he had

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[21] See Kemp v. United States, 41 App.D.C. 539 (D.C. Cir. 1914), *cert. denied,* 234 U.S. 756 (1914), and compare note 18, *supra.*

[22] Cf. Kemp v. Board of Medical Supervisors, *supra* note 18. It may be noted that many acts are specifically proscribed by various sections of the Code as to which penalties are provided by D. C. CODE § 2-130 (Supp. VI, 1957). In addition, if one unlawfully practices the healing arts and is convicted accordingly, future violations may be enjoined under § 2-132.

[23] It has been held elsewhere that revocation proceedings may run against a licentiate even after his acquittal on an abortion charge. See, e.g., Munk v. Frink, 81 Neb. 631, 116 N.W. 525, 528 (1908).

been questioned throughout the entire day by the police and that he was scared.

"Dr. Ladrey told Matthews to come to his office," the officer testified, and then appellant hung up the telephone.

"Mathews made a second telephone call in the same manner," and (we omit some detail) "Dr. Ladrey told Matthews to catch a taxicab and come directly to his office on N Street." After further conversation, "Dr. Ladrey asked Matthews if he was sure he wasn't being followed by the police. He stated he was sure he wasn't being followed by the police."

When appellant was interviewed by the officer, "He admitted most of the conversation," but denied asking "Are you sure you are not being followed by the police"[!]

So ran the testimony which appellant urges was erroneously admitted on the ground "that Gosman's monitoring on an extension telephone constituted wire tapping." He argues that "Matthews' 'acquiescence' to Gosman's listening can hardly be equated with 'authorizing' him to listen," and that "there is no circumstance which will support the theory that Matthews *authorized* Gosman to *divulge* the conversation." Thus the statute[24] was violated, he claims, in that the appellant had not authorized the officer to "intercept" and to "divulge" the intercepted communication.[25]

We must reject his contention. No one is bound to answer a ringing telephone. If he does pick up the receiver, he is not required to talk to the outside caller. If he chooses to talk, he may well understand that the calling party, the original "sender," may have others listening to

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[24] *Supra* note 3.

[25] He relies upon United States v. Polakoff, 112 F.2d 888 (2 Cir. 1940); Sullivan v. United States, 95 U.S.App.D.C. 78, 219 F.2d 760 (D.C. Cir. 1955). Both cases suggest that the respective parties to a telephonic conversation are "senders."

the conversation, whether in a group around the caller's telephone or on an extension attached to it. Quite apart from any such observations, the Supreme Court has passed upon the point,[26] adversely to appellant's claim. "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain."[27] The Court held squarely that Section 605 had not been violated, for there had been no "interception" as Congress intended the word to be used. We need go no further.

We reviewed this case *en banc* because of the importance of various aspects of the appellant's case. After extensive consideration of the several points, we are satisfied there is no error.

Affirmed.

BAZELON, *Circuit Judge,* with whom EDGERTON, *Chief Judge,* and FAHY, *Circuit Judge,* join, dissenting: I dissent from the majority's holding that Detective Sergeant Gosman's testimony concerning the telephone conversations was properly received in evidence. If that testimony was inadmissible the Government does not contend that it was not prejudicial. The testimony recounted two telephone conversations between appellant and one Matthews, the paramour of the deceased woman upon whom the abortion was allegedly committed, to which police listened on an exten-

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[26] Rathbun v. United States, *supra* note 15, 355 U.S. at 110-111.

[27] *Id.* at 111; and see discussion, *Bradley and Hogan, Wiretapping: From Nardone to Benanti and Rathbun,* 46 GEO. L.J. 418, 434 *et seq.* (1958).

sion telephone. The calls were made by Matthews from the office of the Homicide Squad where he was being questioned. He knew—but appellant did not know—that the police were listening to the conversations. Upon defense counsel's objection to Sergeant Gosman's testimony as "wire tap evidence" the trial judge ruled the testimony admissible because "one of the parties acquiesced in the conversation being intercepted." He said it did "not make any difference" to his finding of acquiescence that this party was in the custody and control of the police.

Section 605 of the Federal Communications Act, 48 STAT. 1103, 47 U.S.C. § 605, commands that " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person . . . ."

The question is whether Sergeant Gosman "intercepted" the communications between Matthews and the appellant. The majority treats the Supreme Court's recent decision in *Rathbun* v. *United States*, 355 U.S. 107 (1957), as dispositive of this issue. I disagree. In *Rathbun*, one Sparks, a telephone subscriber, expected a long distance call threatening his life. He "requested" the police to overhear the conversation on his telephone extension, and they complied with his request. 355 U.S. at 108. The request was voluntary in every sense. The Supreme Court held that compliance with the request was not an "interception." The present case is quite different. There is nothing to suggest that Matthews, who telephoned to the present appellant, invited or requested the police to listen to the conversations. On the contrary, it is quite as likely that the plan to have the police listen and even the plan to have Matthews telephone to the appellant, originated with the police. It is not even clear that Matthews freely consented, though he did at least submit. He was not using his telephone but a police

telephone. There is nothing to suggest that he could have prevented them from using their own telephone in their own way. In other words, there is no evidence that he could have made the calls without their listening to it. It does not even appear that they consulted him instead of merely telling him they were going to listen. In my opinion the *Rathbun* rule, that there is no interception of a telephone conversation when one party to it invites a third person to listen, has no application to these facts.

Since the record does not show whether or not there was interception, I would vacate the judgment and remand the case to the District Court for reconsideration upon a supplemented record.

In that disposition of the case it is not necessary to reach the constitutional question of the validity of the license revocation statute. But, since I read the majority as deciding that question, it is permissible to record my dissent from its conclusion.

The statute, D. C. CODE § 2-123, authorizes the District Court to revoke a doctor's license "upon evidence showing to the satisfaction of the court that [he] has been guilty of *misconduct* . . . ." Emphasis supplied. No one, I suppose, would suggest that Congress may validly authorize the District Court to convict an individual of a crime and sentence him to fine or imprisonment for being guilty of "misconduct." Such a standardless criminal statute would obviously be void for vagueness. And, as this court has said, "the principles that apply in the protection of" a doctor's right to practice his profession "are of the same general nature, though not in all particulars, as those which safeguard him when prosecuted for the commission of a minor offense." *Czarra* v. *Board of Medical Supervisors*, 25 App.D.C. 443, 454 (1905).

In *Czarra*, we held invalid the predecessor statute of D. C. CODE § 2-123 which authorized license revocation on a finding of "unprofessional or dishonorable conduct."

We said:

> Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts. 25 App. D.C. at 453.

We concluded that the standard provided—"unprofessional or dishonorable conduct"—was essentially no standard at all. Yet that standard, in a statute dealing with the medical profession, is probably clearer and more definitive than the "misconduct" standard provided by the instant statute. The earlier statute would at least exclude as a ground of revocation such misconduct as does not reflect on professional standing or personal honor. Under the present statute any misconduct—even traffic offenses—could, in the uncontrolled discretion of the District Court, serve as a basis for revoking a license.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

No. 13,906

C. A. 3156-55

Filed July 31, 1958

DR. HENRY M. LADREY, *Appellant*,

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting en banc.

JUDGMENT

This cause came on to be reheard en banc on the transcript of the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, *affirmed*.

Dated: July 31, 1958.

Per Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Bazelon, with whom Chief Judge Edgerton and Circuit Judge Fahy join.

A true copy, Test: Joseph W. Stewart, Clerk, United States Court of Appeals for the District of Columbia Circuit.

By: Elisabeth E. Nameth, Deputy Clerk.

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FILED
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JAMES P. BROWNING, Clerk

No. 483

In the Supreme Court of the United States

OCTOBER TERM, 1958

DR. HENRY M. LADREY, PETITIONER

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 483

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court appears at pages 55–56 of the Record. The opinion of the Court of Appeals (R. 59–71) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1958, and the petition for a writ of certiorari was filed on October 29, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. (a) Whether petitioner has waived his right to challenge the constitutionality of the provision of the Healing Arts Practice Act of the District of Columbia under which his license to practice medicine and surgery was revoked by failing to raise the question in the district court.

(b) Whether the provision of the Healing Arts Practice Act of the District of Columbia authorizing the district court, sitting as a court of equity, to revoke a physician's license when it finds he "has been guilty of misconduct or is professionally incapacitated," is so vague as to be unconstitutional.

2. Whether testimony by a police officer as to the contents of a telephone conversation which he overheard by listening on an extension phone to a call by one in police custody is inadmissible against the receiver of the call because obtained in violation of Section 605 of the Federal Communications Act.

STATUTES INVOLVED

Section 605 of the Federal Communications Act, 47 U. S. C. 605, provides in pertinent part:

> * * * [A]nd no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

Title 2, District of Columbia Code (1951 ed.), Section 123, provides:

> The District Court of the United States for the District of Columbia, sitting as a court of

equity, may suspend or revoke any license issued and any registration effected under this chapter, upon evidence showing to the satisfaction of the court that the licentiate or registrant, as the case may be, has been guilty of misconduct or is professionally incapacitated.

Proceedings looking toward the suspension or revocation of a license or registration shall be begun by petition filed in the District Court of the United States for the District of Columbia in the name of the Commission on Licensure to Practice the Healing Art, or of the Commissioners of the District of Columbia, or of the [chief] of police of said District, and shall be verified by oath. Proceedings shall be conducted according to the ordinary rules of equity practice and such supplementary rules as said court may deem expedient to carry into effect the purpose and intent of this chapter; and said court is hereby authorized to make such supplementary rules. An appeal may be taken from the decision of the District Court of the United States for the District of Columbia to the United States Court of Appeals for the said District. Any such appeal on behalf of the Commission or of the Commissioners of the District of Columbia or of the [chief] of police of said District may be filed without bond. The District Court of the United States for the District of Columbia may determine whether a license or registration shall be suspended or be revoked, and if such license is to be suspended said court may determine the duration of such suspension and the conditions under which such suspension shall terminate.

Title 2, District of Columbia Code (1951 ed.), Section 131, provides:

> If a person licensed or registered under the provisions of this chapter be convicted in the District Court of the United States for the District of Columbia of any felony, the court, without further hearing or procedure, may suspend for such time and under such conditions as it deems proper, or may revoke, the license or registration of the defendant, in addition to imposing any other penalty provided by law. An appeal by the defendant in any such case from the conviction of the offense shall act as a supersedeas to the judgment of the court suspending or revoking his license or registration.

STATEMENT

Respondent, the Commission on Licensure to Practice the Healing Art in the District of Columbia, brought this equity action to revoke the license of petitioner to practice medicine and surgery in the District of Columbia (R. 1). Section 2–123 of the District of Columbia Code (*supra*, pp. 2–3) provides for such revocation by the District Court for the District of Columbia, sitting as a court of equity, upon a finding that the licentiate "has been guilty of misconduct or is professionally incapacitated." The complaint charged, and the district judge found, that petitioner had been guilty of "misconduct" in that, while a duly licensed and registered doctor and surgeon, he had on or about November 23, 1954, prescribed or administered a drug or had used an instrument on the person

of a pregnant woman with the intent of procuring a miscarriage, as a result of which the woman had a miscarriage and died three days later (R. 2).[1]

Petitioner appealed to the Court of Appeals, alleging (1) that this finding was clearly erroneous and rested upon insufficient evidence, (2) that the statutory term "misconduct" was too vague and indefinite to meet the requirements of due process, (3) that revocation of a doctor's license for performing an illegal abortion may be had only under D. C. Code, § 2–131, after conviction for a crime[2] and, (4) that the court improperly admitted, because obtained in violation of Section 605 of the Federal Communications Act, testimony of a police officer as to two conversations which he monitored on a telephone extension while a material witness spoke with petitioner. The Court of Appeals, sitting *en banc*, rejected all of these contentions and affirmed the judgment against petitioner (R. 59–68). A dissenting opinion was filed, to which three judges subscribed (R. 68–71).

ARGUMENT

Petitioner here relies upon two of the four arguments he raised in the Court of Appeals in urging that his license to practice medicine was improperly revoked: (1) that the statute providing for revocation

[1] The trial judge made no findings as to two other charges in the complaint: (1) that petitioner visited the deceased, but denied that he had done so: and (2) that petitioner failed to notify the police or the coroner of her death (R. 2).

[2] This statute (*supra*, p. 3) provides that, upon conviction for any felony in the district court, a physician's license may be revoked without any further hearing or procedure.

was so vague as to be unconstitutional and (2) that certain evidence introduced against him in the revocation proceeding was inadmissible because obtained in violation of Section 605 of the Federal Communications Act. We believe that petitioner's failure to raise the constitutional question in the district court precludes him from pressing that issue in this Court and that, in any event, the contention is without merit. Petitioner's second contention is, we submit, also without merit. Thus, there is no occasion for further review by this Court of either question raised by petitioner.

1. (a) Petitioner argues that Section 2–123 of the D. C. Code, *supra*, pp. 2–3, is unconstitutional because, in providing for revocation of his physician's license for "misconduct" or professional incapacity, the statutory language is so vague and indefinite as to violate the requirements of due process. But petitioner's failure in the trial court to raise any question of the constitutionality of the statute forecloses him from raising this issue, either in the appellate court, as the Court of Appeals held (R. 65), or in this Court. *Shelley* v. *Kraemer*, 334 U. S. 1, 8; *Yakus* v. *United States*, 321 U. S. 414, 444; *Duignan* v. *United States*, 274 U. S. 195, 200; *Wong Tai* v. *United States*, 273 U. S. 77, 78; cf. *Ullmann* v. *United States*, 350 U. S. 422, 439, n. 15; and see generally, *United States* v. *Petrillo*, 332 U. S. 1, 10.

(b) Moreover, even if this question is properly raised, it plainly is without merit. "Misconduct" has a clear and well-defined meaning in reference to professional activity; and since revocation of a physician's license on this ground in the District of Columbia can result only after a formal action in equity in the district court, with all of the safeguards of the Federal Rules, and the right to seek appellate review of an adverse decision, there can be no doubt as to the reason for revocation nor is there danger of an abuse of the statutory criterion. Thus, in the circumstances of this case, petitioner can hardly contend that an express finding that he performed an illegal abortion, as a result of which the patient died, is not such professional "misconduct" as to warrant revocation of his license to practice medicine; he was fully advised of the details of this charge and had ample opportunity to refute or explain it. Hence, petitioner has no basis for a complaint that he was denied due process of law.

"Misconduct" is, of course, a universal basis for professional disqualification. Whether dealing with doctors, dentists, lawyers, teachers, or engineers, statutes or rules regulating these professions almost invariably provide that the privilege to practice the profession may be withdrawn for "misconduct"; and in each case of misconduct the term is given content by references to the standards of the particular profes-

sion.[3] As the New York Court of Appeals pointed out in sustaining the revocation of a dentist's license for "unprofessional conduct," the standards of conduct in any profession are "part of the ethics of the profession and 'what is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.'" *Cherry* v. *Board of Regents*, 289 N. Y. 148, 158, 44 N. E. 2d 405, 412. The court continued (*ibid.*): "Every member of the profession should be regarded as an expert for such purpose. There is a moral dereliction in failure by any member of a profession to apply in professional practice the standards which, by consensus of opinion in the profession, are necessary."[4]

The necessity for such a flexible criterion is obvious; any attempt, as in a criminal statute, to spell out the specific activities which result in professional disquali-

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[3] A large number of cases defining and applying this criterion of "misconduct" with reference to the various professions are collected in 27 Words & Phrases 309–316, and particularly in the 1958 pocket part volume, pp. 80–89. In accordance with this general practice, both this Court and the Court of Appeals below provide in identical language for disbarment of attorneys "guilty of conduct unbecoming a member of the bar of this court." Rule 8, Rules of the Supreme Court of the United States; Rule 7 (e) (2), General Rules of the United States Court of Appeals for the District of Columbia Circuit.

[4] See also *Bell* v. *Board of Regents*, 295 N. Y. 101, 65 N. E. 2d 184; *In re Smith*, 10 Wend. (N. Y.) 449; *Duke* v. *Committee on Grievances*, 82 F. 2d 890 (C. A. D. C.); *Hatfield* v. *New Mexico State Board of Registration*, 60 N. M. 242, 290 P. 2d 1077; cf. *Ex parte Secombe*, 19 How. 9, 14; *Ex parte Wall*, 107 U. S. 265.

fication would simply weave a loose-meshed net through which many miscreants could escape. Indeed, the District of Columbia Code does specify, as grounds for automatic revocation of a license, the conviction of a felony. D. C. Code Sec. 2–131, *supra*, p. 3. By further providing in Section 123 for revocation upon a finding of misconduct, however, the statute properly goes beyond the scope of the criminal law and imposes upon the practitioners of the healing arts the duty to conform to the ethics of their own professions. The standards prescribed by Congress in a statute such as this must, of course, "be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.' *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90, 104." *Lichter* v. *United States*, 334 U. S. 742, 785. In the present case, both the persons to whom the statute applies, practitioners of the healing arts, and those charged with the duty of enforcing this standard of conduct, the members of the Committee on Licensure to Practice the Healing Art, are fully aware of the meaning and content of the statutory criterion. In the words of the court below (R. 64–65): "The purpose of the statute here is clear and calls for no further exploration into semantics. Congress intended to provide a remedial measure for the protection of the public, and misconduct certainly included, and must have been known by a medical

practitioner to have included, the performance of an illegal abortion."[5]

Nor is the determination of whether a physician is guilty of "misconduct" left to the discretion of a hearing board uncontrolled by fully adequate rules of procedure. To the contrary, only the District Court for the District of Columbia, in a formal equity proceeding, can make such a finding, after the defendant has had full opportunity to utilize the provisions of the Federal Rules of Civil Procedure, both in framing his pleadings and in preparing for trial. As the Court

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[5] The only case which petitioner cites as support for his contention that "misconduct" is too indefinite a term to regulate professional licensure is a 1904 decision of the Court of Appeals for the District of Columbia. *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443. That case held that the provision in the predecessor statute to the present Healing Arts Practice Act permitting an administrative board of medical supervisors to revoke a physician's license for "unprofessional or dishonorable conduct" was void for uncertainty. Whatever the state of the medical profession in 1905, however, it plainly is guided today by a definite and ascertainable code of ethics, upon which the public is entitled to rely, and which each member of the profession is presumed to know. See *e. g.*, *Principles of Medical Ethics of the American Medical Association*, A. M. A. Directory (20th Ed., 1958), p. 25; Sperry, *Ethical Basis of Medical Practice* (1950); Healey, *Medical Ethics* (1956). Moreover, as we point out, *infra*, pp. 10–11, unlike the situation which obtained when *Czarra* was decided, the power to revoke a physician's license today rests, not in an administrative board, with "insufficient safeguards" for the practitioner (opinion of Court of Appeals, R. 63, fn. 13), but in a court of equity, with full procedural and appellate protection. Finally, of course, even if the result below is considered inconsistent with the *Czarra* case, a refusal by the Court of Appeals to follow its own reasoning in a fifty-year-old case involving a different statute and different circumstances clearly supplies no basis for invoking this Court's jurisdiction.

of Appeals found (R. 64), "'[m]isconduct', as a ground for suspension or revocation is not left as a matter of opinion but is susceptible to complete exposition under the Rules and requires proof as a matter of fact accordingly." And, finally, the statute provides for review by the Court of Appeals of a finding of misconduct. Accordingly, a defendant is fully protected, both against any confusion or uncertainty as to the charge against him, and against abuse of the statutory criterion.

2. Petitioner also contends that testimony by a police officer as to the content of telephone conversations between petitioner and the witness George Matthews was inadmissible because obtained in violation of Section 605 of the Federal Communications Act, *supra*, p. 2. Matthews, the paramour (R. 13) of the woman on whom the abortion was performed, had given the police a statement concerning the circumstances of her death. While at police headquarters, Matthews made two telephone calls to the petitioner at his office and, with Matthews' knowledge, the conversations were monitored by police officers through an extension telephone (R. 39.)[6] Defense counsel ob-

[6] The Court of Appeals summarized the telephone conversations as follows (R. 66–67):

> * * Matthews told the appellant he had been questioned throughout the entire day by the police and that he was scared.
>
> "Dr. Ladrey told Matthews to come to his office," the officer testified, and then appellant hung up the telephone.
>
> "Matthews made a second telephone call in the same manner," and (we omit some detail) "Dr. Ladrey told Matthews to catch a taxicab and come directly to his office

jected to the admission of testimony as to these conversations and the following took place (R. 39–40):

Mr. WRIGHT [Defense counsel]. I don't think it would be legal evidence, if it is a question of wire tap evidence.

The COURT. That is not wire tapping.

By the COURT:

Q. You say you monitored the conversation through an extension. This conversation was between whom?—A. Between George Matthews and Dr. Ladrey, Your Honor.

Q. And where were the two parties located at the time of the conversation?—A. Dr. Ladrey was in his office and George Matthews was in the Homicide Squad.

Q. Did George Matthews or Dr. Ladrey, or either of them, know that the conversation was being monitored?—A. George Matthews did; yes, sir.

The COURT. The objection is overruled.

I had occasion to pass on this point in the case of United States against Sullivan, and the wire tapping does not apply to a situation where one of the parties acquiesced in the conversation being intercepted.

Mr. WRIGHT. Well, Your Honor, wouldn't this situation be different in that at the time the alleged conversation was had the witness Matthews was in the custody of the police?

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on N Street." After further conversation, "Dr. Ladrey asked Matthews if he was sure he wasn't being followed by the police. He stated he was sure he wasn't being followed by the police."

When appellant was interviewed by the officer, "He admitted most of the conversation," but denied asking "Are you sure you are not being followed by the police"[?]

The COURT. That would not make any difference.

Mr. WRIGHT. And therefore under their control.

The COURT. That would not make any difference.

Proceed.

The evidence of the telephone conversations was, we submit, properly admitted. Cf. *Rathbun* v. *United States*, 355 U. S. 107. The *Rathbun* decision held that a communication which the *petitioner* in that case initiated and which was overheard by police officers at the request of the receiver of the call upon the latter's regularly used telephone extension did not constitute an interception within the meaning of statute. The Court stated (355 U. S. at 111):

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred.

In the present case, of course, the originator of the calls was the witness, not the petitioner, and the policemen listened to the calls on their own extension telephone. Also, proof that Matthews voluntarily consented to use of the extension by the police is absent here and the fact that consent was present was repeatedly adverted to by this Court in *Rathbun*. In these respects, this case differs from *Rathbun*.

The interception which is proscribed by Section 605, however, is an interference with the system of communication by interception in the process of transmission and not in listening on a regularly installed telephone instrument to a message which is being transmitted, without mechanical interception to the place to which it was directed. See *Goldman* v. *United States*, 316 U. S. 129, 133, 134; *Rayson* v. *United States*, 238 F. 2d 160 (C. A. 9); *United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7); *United States* v. *Lewis*, 87 F. Supp. 970 (D. D. C.), reversed on other grounds, 184 F. 2d 394 (C. A. D. C.); *United States* v. *Pierce*, 124 F. Supp. 264 (N. D. Ohio), affirmed *per curiam*, *Pierce* v. *United States*, 224 F. 2d 281 (C. A. 6). Thus, the fact that Matthews made these calls from police headquarters where he was being questioned by police officers does not make the act of those officers an "interception." Nor is the presence or absence of consent relevant to whether use of an extension telephone constitutes an interception.

As this Court said in *Rathbun*, "[c]ommon experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument." 355 U. S. at 111. Use of such an extension, with or without the consent of the other party to the call, is a hazard which those who speak over the telephone must face. What is crucial is, not the state of mind of the speaker or listener, but the mechanical means by which the call is overheard. It has been held, therefore, that even where one of the parties to the call is under arrest, and is ordered by the police to conduct a telephone

conversation while a police officer listens, there is no "interception" of the message of which the other party to the call can complain. *United States* v. *Bookie*, 229 F. 2d 130, 131 (C. A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C. A. 6); *Pierce* v. *United States*, 224 F. 2d 281 (C. A. 6), affirming 124 F. Supp. 264 (N. D. Ohio); cf. *United States* v. *White*, 228 F. 2d 832 (C. A. 7); *United States* v. *Sullivan*, 116 F. Supp. 480 (D. D. C.), affirmed, 95 App. D. C. 78, 219 F. 2d 760; *United States* v. *Guller*, 101 F. Supp. 176 (E. D. Pa.); *United States* v. *Lewis*, 87 F. Supp. 970 (D. D. C.), reversed on other grounds, 87 App. D. C. 274, 184 F. 2d 394; *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W. D. Pa.).

Under the facts of this case, therefore, no violation of Section 605 occurred and testimony relating to the telephone calls was properly admitted in evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 483

DR. HENRY M. LADREY, *Petitioner*,

v.

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART IN THE DISTRICT OF COLUMBIA, *Respondent*.

Petition for Rehearing on Petition for Writ of Certiorari

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Petition for Rehearing on Petition for Writ of Certiorari

To: The Honorable The Chief Justice of the United States and Honorable Associate Justices of the Supreme Court of the United States.

Comes now the petitioner and presents this petition for a rehearing on the petition for a Writ of Certiorari filed in this case.

JURISDICTION

The petition for certiorari was filed on October 29, 1958. On December 15, 1958, the Court entered the following order:

> "The petition for writ of certiorari in this case is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted.

Mr. Justice Frankfurter took no part in the consideration or decision of this application."

This petition for rehearing is filed within 25 days from December 15, 1958 In accordance with Rule 58 of this Court.

REASONS FOR PETITION FOR REHEARING

Petitioner urges this Court to rehear his petition because the decision of the lower court marks the first step in the crystalization of confusion and uncertainty in the law in the District of Columbia with respect to Title 47, U.S.C. Section 605. This is aptly demonstrated by the lower court's decision, the respondents' answers to the wire tapping issue, and the recent decision in *United States* v. *Barbour*, 164 F. Supp. 893 (D. C. 1958). This latter case appears in the October 27, 1958 advance sheet of Federal Supplement, and was not familiar to the petitioner at the time his petition was filed on October 29, 1958. But it graphically illustrates the court's apparent uncertainty as to the import of *Rathbun*, when it states: ". . . Upon the basis of the cases of *Goldman* v. *United States*, supra, and *Rathbun* v. *United States*, supra, this Court denies the motion of the defendant to suppress as evidence the ten capsules, for the information obtained by the police in the manner previously stated did not constitute a violation of Title 47, U.S.C.A. Section 605," p. 897. In *Barbour*, a police officer had a special employee of the narcotics squad place a call to Ad 2-4559, and the former listened to the conversation between the special employee and one "Sonny," wherein arrangements were made for the purchase of narcotics. During the conversing, Sonny told the special employee that narcotics were presently on the premises, 62 P Street, N.W. Arrangements were made for the purchase of narcotics and after they were obtained the police officers secured a search warrant for the premises and found narcotics therein. The motion to suppress was predicated upon the violation of 47 U.S.C.A. Section 605.

The District Judge expresses his impression that there is "... a clear conflict as to what constitutes an unauthorized interception within the meaning of Section 605." *Barbour*, supra, 164 F. Supp. 893, 896, and indicates his uncertainty as to whether or not *Rathbun* resolves it by drawing on *Goldman*, supra, for additional support.

In the instant case *Rathbun* v. *U. S.*, 355, U.S. 107, was relied upon by the court below in disposing of this issue. Mr. Justice Frankfurter, speaking for the minority in that case, observed

> "The fact that the Court relies on 'the consent of one party' evidently implies that it would not be without the purview of Section 605 for a police officer to conceal himself in a room of a house or a suite of offices having several 'regularly used telephone extensions' and surreptitiously to utilize such an extention to overhear telephone conversations." 355 U.S. ——.

But respondent contends to the contrary that Mr. Justice Frankfurter's hypothetical police officer would be without the purview of Section 605 and that his testimony as to the telephone conversation would be admissible.

In its original brief respondent relied entirely upon the court's decision in *Rathbun* v. *U. S.*, supra. (Brief of respondent filed November, 1958, p. 12.) However, in its subsequent brief in opposition respondent compares the operative facts in *Rathbun* with those in this case, and candidly concedes that: "... in these respects this case differs from Rathbun"; but urges, however, that this court should not review the decision because it falls within the purview of an alleged well-settled principle that "the presence or absence of consent [is not] relevant to whether use of an extension telephone constitutes an interception"; for "the interception which is proscribed by Section 605 ... is an interference with the system of communication by interception in the process of transmission and not in listening on a regularly installed telephone instrument to a message which is being

transmitted without mechanical interception to the place to which it was directed" (Brief for Respondents, p. 14, Dec. 1958). Cited as authority for this view are *Goldman* v. *U. S.*, 316 U.S. 129, 133, 134; and several Circuit Court cases (Ibid. p. 14-15).

While respondent evidently is driven to this "mechanical" argument by the absence, as it concedes, of that element which the majority in *Rathbun* relied upon, viz. "the consent of one party," its position cannot be reconciled with the language or the rationale of *Rathbun*. For if this Court regarded such an interpretation of 47 U.S.C. Section 605 as the law, it is inconceivable that it would have ignored it as the basis of decision in *Rathbun*.

If this case involved the application of a little used or seldom applied principle of law it might fairly be said to have little to commend itself to this court's consideration for certiorari. But indications are that this is not so. Already a body of case law, of which this case is one example, has begun to develop in which *Rathbun* is cited as authority for the general proposition that evidence obtained by police officers by listening in on one of their extension telephones to conversations between persons under their control and a sender, without the latter's consent, is admissible against him, e.g. *Douglas* v. *United States*, 250 F. 2d 576 (4th Cir. 1957); *United States* v. *Barbour*, supra.

We feel that this court in *Rathbun* intended to establish no such precedent. As petitioner reads *Rathbun*, this court simply held that there was no interception under the peculiar circumstances present there.

We therefore urge this court to grant this petition and clarify the law in this area so that the lower courts may be guided in the resolution of future cases involving facts dissimilar to *Rathbun*. See *The Supreme Court, 1957 Term*, 72 HARV. L. Rev. 77, 150-52 (1958).

CONCLUSION

For the foregoing reasons, the petitioner respectfully urges that a rehearing be granted; that upon further consideration that the order of December 15, 1958, denying the petition for certiorari be revoked, and that the writ of certiorari issue.

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I, William B. Bryant, counsel for the petitioner, Henry M. Ladrey, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay and that this petition is restricted to the grounds urged. as provided under R. 58

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